IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner

-vs-

STATE OF NEW YORK,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

Irving Jerome Dunaway was illegally arrested by members of the Rochester Police Department on August 11, 1972 and the taint of that illegal arrest was not dissipated by any of the intervening factors outlined in the Court in Brown v. Illinois, 422 U.S. 590 (1975). Further, since the police action was not required "for their safety" or due to any "exigent circumstances," their calculated seizure of the petitioner without probable cause was not reasonable under the Fourth Amendment.

POINT I: THE PETITIONER WAS ARRESTED WITHOUT PROBABLE CAUSE AND SINCE THE TAINT OF THAT ILLEGAL ARREST WAS NOT PROVEN BY THE PROSECUTION TO HAVE BEEN DISSIPATED, THE CONFESSION OBTAINED BY THE POLICE SHORTLY AFTER PETITIONER'S ARREST WAS ERRONEOUSLY ADMITTED INTO EVIDENCE AT HIS TRIAL SINCE IT WAS OBTAINED IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS.

A: The Petitioner's Arrest and/or "Seizure" Response to Respondent's Point I pp. 7-9

In Point I of their brief, respondent argues that petitioner was not seized because he agreed to accompany the officers. In making this argument, the respondent completely ignores Judge Mark's findings after the hearing wherein he ruled,

> ..., there can be no doubt that this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police Oregon v. Mathiason, ___U.S. ____, 1/25/77, or where the defendant was merely escorted to police headquarters by the police. People v. Brown, 86 Misc 2d 339. (A-117; emphasis added)

A reading of People v. Brown, supra clearly establishes that Judge Mark specifically overruled the proposition the respondent is now attempting to raise.

The Appellate Division's finding that the defendant went voluntarily with the police does not change or alter Judge Mark's ruling as it applied to the issue of petitioner's arrest. Had the Appellate Division intended such a result, this case could have been decided on existing law by holding

that the petitioner consented to the arrest and detention, thereby waiving his constitutional objections (People v. Morales, 52 AD2d 818 (1st Dept. 1976) affd. 42 NY2d 129, 137-138(1977); People v. Gonzalez, 39 NY2d 122, 127 (1976)). They refused to do so.

Further, and more significantly, the law does not require a defendant to "resist" a police confrontation in order to preserve and protect his constitutional rights. (United States v. Lampkin, 464 F2d 1093, 1095 (3rd Cir. 1972). This rule is sound because to hold that a defendant is required to resist and object to any police confrontation would seriously jeopardize the safety of police officers in performing their authorized duties (See, United States v. Edmons, 432 F2d 577 (2nd Cir. 1970), where the defendants resisted a police confrontation creating a very dangerous police-citizen situation).

Clearly the petitioner was cognizant of the fact that he was under the control of the police detectives (A 81) and the police intended that to be the nature of the restraint they placed on this youth's liberty (A 73; 76; 109-110).

This petitioner was arrested by the Rochester Police Department without probable cause. To permit an "arrest on mere suspicion collides violently with the

basic human right of liberty." (Henry v. United States, 361 U.S. 98, 101 (1959) [quoting from Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rational and Rescue, 47 Geo. L. J. 1, 22]).

C: Attenuation under Brown v. Illinois, 422 U.S. 590. Response to Respondent's Point III pp. 23-34

It appears that respondent's basic position is that since petitioner's confessions and sketches were voluntary (i.e. an obvious Fifth Amendment issue) there is no real need to examine the admissibility of his confessions in light of the Fourth Amendment. As respondent states, "..., we submit that the 'taint' created by the police conduct was de minimus, at most.... Therefore the Court should require very little additional proof of voluntariness beyond the Fifth and Sixth Amendment requirements." (Respondent's brief p. 26). Counsel for the petitioner respectfully submits that it was this precise argument this Court rejected in Brown v. Illinois, supra. In that case this Court specifically recognized the importance and independence of the protections provided by the Fourth Amendment. It is for that reason that the Court established certain criteria which should be used in determining whether the "taint" of an illegal seizure has been dissipated. The respondent does not contest the fact the petitioner clearly complies with three of the

four criteria. They merely contend that the police conduct in this case was not "flagrant" because the police did not use force or weapons when they arrested this petitioner. In support of their position they cite United States v. Kilgen 445 F2d 287 (5th Cir. 1971), a case referred to in footnote 9 of this Court's opinion in Brown v. Illinois, supra. Petitioner respectfully submits that cases referred to in that footnote pertain to the issue of "the purpose of the official misconduct." A brief analysis of the cases cited therein would, therefore, seem appropriate.

United States v. Edmons, 432 F2d 577 (2nd Cir. 1970) involved a case where the petitioners were arrested for failing to have selective service cards on their person. Yet it was clear from the record that the arrests were made to gather information about an earlier assault on an F.B.I. agent.

United States ex rel. Gockley v. Myers, 450 F2d 232 (3rd Cir. 1971) cert. denied 404 U.S. 1063 (1972) involved a case where an arrest warrant (without probable cause) was issued for forgery and upon his arrest it became apparent the police wanted to question the defendant about information he had regarding a recent murder.

In both cases the arrests were effectuated as a pretext for collateral objectives.

United States v. Kilgen, supra presented a situation where the police arrested petitioner for a violation of existing vagrancy laws. The arrest was for that purpose and the record in that case did not disclose any ulterior motive for the arrest. Later, the petitioner confessed to a Burglary and his confession was not suppressed. In Kilgen, it is clear that there was no ulterior motive or purpose for the petitioner's arrest. Since the purpose of the arrest in Kilgen was proper, his confession was found to be admissible. However, the purpose of the arrests in Edmons and Gockley was not proper and the evidence derived therefrom was suppressed.

In the case at bar, the purpose of the petitioner's arrest by the police was to interrogate petitioner incommunicado in the hope of turning up evidence. In other words, the purpose of the arrest was purely investigatory.

In order to determine whether the police conduct in this case was "flagrant," Mr. Justice Powell's concurring opinion in Brown v. Illinois, supra is most helpful. Therein three examples are given of conduct which should be considered flagrantly abusive:

> If, for example, the factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause...,
>
> or if the evidence clearly suggested that the arrest was effectuated as a pretext for collateral objectives...,
>
> or the physical circumstances of the arrest unnecessarily intrusive on personal privacy... (Brown v. Illinois, supra, at 610-611 [Powell, J., concurring]).

The facts in Brown clearly complied with the third example set forth above; while the facts in petitioner's case clearly come within the first example of flagrant official misconduct. The Court's below have unanimously held that the police clearly acted without probable cause (A-121; 125-126) and as Justice Cardamone stated at the Appellate Division in his dissenting opinion, "the arrest or detention made here, concedely without probable cause, without a warrant and under circumstances which were investigatory in nature constitutes flagrant official misconduct." (A-132)

Since the facts in the case at bar clearly constitute flagrant official misconduct as set forth in Mr. Justice Powell's first example, it follows that "the clearest indication of attenuation" is need; otherwise, the deterrent value of the exclusionary rule is most likely to be effective, and..., most clearly demands that

the fruits of official misconduct be denied." (Brown v. Illinois, supra, at 611 [Powell, J., concurring]; Also see, Ryon v. Maryland, 422 U.S. 1054 (1975), on remand 349 A2d 393 (Md. 1975); People v. Bates, 546 P 2d 491 (Colo. 1976)).

POINT II: SHOULD THIS COURT CHOOSE TO DIFFERENTIATE BETWEEN "ARREST" AND/OR "SEIZURE" AND "DETENTION" AND SHOULD IT FIND THAT THIS PETITIONER WAS NOT "ARRESTED," THEN DID PETITIONER'S "SEIZURE FOR PURPOSES OF DENTENTION AND/OR INTERROGATION" VIOLATE THE FOURTH AMENDMENT.

D: Application of "Reasonableness Standard" Response to Respondent's Point II pp. 10-22

In their brief respondent argues that the police action of seizing petitioner without probable cause was reasonable under the Fourth Amendment

Since this Court has never held that custodial detention and interrogation on less than probable cause is permissible under the Fourth Amendment (Terry v. Ohio, 392 U.S. 1, 19 footnote 16 (1968); Morales v. New York, 396 U.S. 102, 104-105 (1969)), the respondent is clearly suggesting an additional exception to the Fourth Amendment's requirement of probable cause. As the brief filed by amici indicates, this Court has carefully deliniated

specific exceptions to the requirement of probable cause. Those exceptions have been carefully established and limited to situations where the police have legitimate concerns about their safety when making necessary on the street confrontations. (See, Terry v. Ohio, supra; United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Pennsylvania v. Mimms, 434 U.S. 106 (1977)).

In order to sustain their position, respondent apparently offers four reasons for creating a new exception to the probable cause requirement: (1) the petitioner had no reasonable expectation of privacy; (2) the intense public interest in solving a murder case; (3) the police had exhausted and lacked viable investiative alternatives, and, (4) the "Morales Rule" permitting brief detention for questioning one suspected of a serious crime without probable cause does not give the police broad and unlimited discretion and since the New York Court did not abdicate their responsibility, their judgment is entitled to deference.

What is most interesting about the respondent's argument is that it closely parallels that of the respondent in Mincey v. Arizona, 437 U.S. 385 (1978). In Mincey the respondent was seeking a "murder scene" exception to the warrant requirement of the Fourth

Amendment to enable them to search that petitioner's apartment.[1] In the case at bar respondent's are seeking to create an exception to the Fourth Amendment which would permit the police to "seize" and interrogate a citizen without probable cause. Both cases also involved petitioners convicted of murder.

In Mincey, as in the case at bar, the respondents contend that the petitioners have no reasonable expectation of privacy (Mincey v. Arizona, supra, at 391; respondent's brief pp. 10-12; 16-17). This Court specifically rejected that argument citing Michigan v. Tyler, 436 U.S. 499 (1978) and stating, "it suffices here to say that this reasoning would impermissibly convict the suspect even before the evidence against him was gathered."

The next reason suggested in both cases is the intense "public interest" in either promptly investigating or solving serious murder cases (Mincey v. Arizona, supra, at 393-394; respondent's brief pp 12-13; 15). This Court specifically rejected that argument as well stating, "No one can doubt the importance of this goal. But the public

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[1] As in Mincey, the police in the case at bar also failed to request a warrant.

interest in the investigation of other serious crimes is reprehensible.... 'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine Chimel v. California, supra, at 766." (Mincey v. Arizona, supra, at 393)

The third similar reason advanced by both respondents is that each State Court narrowly confined its holding to certain established guidelines and thereby was entitled to deference (Mincey v. Arizona, supra, at 394; respondent's brief pp. 21-22). That argument was also rejected by this Court. The rule developed in dictum by the New York State Court of Appeals is based on the nature of the crime and a careful guarding of a citizen's Fifth and Sixth Amendment rights. Such a rule is "without rational limitation" and totally disgards the clear intended purpose of the Fourth Amendment which this Honorable Court sought to protect in Brown v. Illinois, supra. - the right of citizens to be free from bodily seizures by the police who are acting without probable cause. Without attempting to be facetious, it appears to this writer that the New York Court of Appeals is attempting to develop a rule that permits the police to ignore the Fourth Amendment as long as the crime is "serious" and the officers comply with the Fifth and Sixth Amendments in

"securing" a confession. This rule totally ignores the criteria and guidelines developed by this Court in Brown v. Illinois, supra. Other state courts have applied and not avoided those criteria (Dixon v. State, 369 A2d 593 (Md. 1975), which was remanded to the Maryland Court on the same day as this petitioner's case; People v. Bates, 546 P2d 491 (Colo. 1976); Commonwealth v. Farley, 364 A2d 299 (Pa. 1976)).

A fourth reason given by the respondent for the broadening of the Fourth Amendment is that the police exhausted and lacked viable investiative techniques (Respondent's brief pp. 18-19). Petitioner respectfully, yet strongly, submits that the respondent never offered any relevant testimony at the hearing before Judge Mark which established this factor or reason. Counsel for the petitioner fails to see the basis for respondent's argument in the record. None of the police officers established what they had done, what they were doing or what they were intending to do! All the record shows is that more than four months had elapsed since the time of the murder.

At the hearing before Judge Mark, the respondent inquired as to the nature of the confrontation and the nature of the information possessed by the police. All that we know from the record is that the source of the

police information and does fail to corroborate that information from Hubert Adams (A-52). We know that the police never even attempted to contact Adams to determine the truthfulness of that information. The respondent, who had the burden of establishing factors relevant to the reasonableness of the police conduct, never raised this issue at the hearing and petitioner respectfully submits that there is no evidence on the record before this Court which justified such a finding. Even if the respondent established the lack of investigative alternative, as the brief filed by amici indicated, "this Court has never suggested that safeguards of the Fourth Amendment can be dispensed with because of the unavailability of other investigative techniques. In fact, the Court has repeatedly indicated the opposite. (citations omitted)" (Brief of Amici p. 13)

It is extremely significant to note that none of the reasons suggested by Respondent deal with the necessities or exigencies of the facts surrounding the police seizure of this petitioner. The reason - there were none. As this Court previously stated, "a central element in the analysis of reasonableness" are "the exigencies of the case." (Terry v. Ohio, supra, at 17-18 footnote 15)

None of the reasons set forth by the respondent show that there was a compelling need for the officers to act as they did in seizing petitioner without probable cause. Clearly, the police conduct was not reasonable when viewed in light of the standards developed by this Court in Terry v. Ohio, supra.

CONCLUSION

Petitioner respectfully requests that the judgment below be reversed and the "fruits" of petitioner's illegal detention be suppressed.

Respectfully submitted,

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